

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs at Jackson September 10, 2002

STATE OF TENNESSEE v. IAN ART DEFREITAS

Direct Appeal from the Circuit Court for Montgomery County
No. 49900063 Michael R. Jones, Judge

No. M2001-02377-CCA-R3-CD - Filed October 31, 2002

The Appellant, Ian Art DeFreitas, was convicted by a Montgomery County jury of disorderly conduct, a class C misdemeanor, and resisting arrest, a class B misdemeanor. At sentencing, DeFreitas was granted judicial diversion, pursuant to Tennessee Code Annotated § 40-35-313 (Supp. 2001). On appeal, the Appellant argues that: (1) the trial court erred in denying a new trial based upon an improper question by the prosecutor during cross-examination of a defense witness, and (2) the evidence is insufficient to sustain his convictions. After review, we find that, as provided by our diversion statute, no judgment of guilty was entered and, as such, the appeal in this case is not an appeal as of right from a final judgment of conviction as required by Rule 3, Tennessee Rules of Appellate Procedure. Because this court lacks jurisdiction to review the appeal, the appeal is dismissed.

Tenn. R. App. P. 3; Appeal Dismissed.

DAVID G. HAYES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOE G. RILEY, JJ., joined.

Timothy K. Barnes and Gregory D. Smith, Clarksville, Tennessee, for the Appellant, Ian Art DeFreitas.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; David H. Findley, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and James Crenshaw, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On December 6, 1999, the Appellant was indicted for disorderly conduct and resisting arrest. The Appellant's "Rule 24(c) Statement of The Evidence" contains the following facts relevant to the background of the case.¹

Ian Art DeFreitas . . . observed some police cars across the street from the Eckerd parking lot and what appeared to be his brother's vehicle. Out of concern for his brother, he crossed the street and went over to ask the officer's what was going on. He was immediately cursed at by the officers and told to move back, which he did.

. . . [T]he weather was very hot, it being July, and . . . he was concerned about his brother's safety since both windows of the police cruiser in which his brother was placed in the back seat were both rolled up.

Mr. DeFreitas again inquired as to the welfare of his brother and was told to move back, which he did. Mr. DeFreitas then . . . was approached by Officer Altman, who told him, to immediately drop to his knees and put his hands behind his head, which Mr. DeFreitas . . . did.

. . . Officer Altman began screaming obscenities at him and began hitting him with a police baton while two other officers, which Mr. DeFreitas believed to be Officers Head and Penna, kicked him and sprayed him with pepper spray.

Officer Penna testified that Mr. DeFreitas was carrying a blue bag, and that at some point during what Officer Penna characterized as an "altercation" with Mr. DeFreitas, Mr. DeFreitas "seemed" to be trying to open the bag. Mr. DeFreitas testified that he was told to put the bag down, which he did immediately, and never attempted to open the bag.

¹The Appellant's purported "Rule 24(c) Statement of the Evidence" fails to comply with the requirements of the rule. First, the statement is not certified as an accurate account of the proceedings. Second, Rule 24(c) requires a "fair, accurate and complete account of what transpired with respect to those issues that are the basis of appeal." There is virtually no testimony of any police officer in the narrative statement; however, we assume that some form of proof was presented by the State at trial. Moreover, the Appellant's account relating to his first issue on appeal is not complete. Third, the record fails to establish that the State ever received notice of the filing of the narrative statement. Had this case been decided upon the merits, it would have required remand for modification or supplementation of the record as provided by Tennessee Rule of Appellate Procedure 24(e). In the future, we urge compliance with Tennessee Rule of Appellate Procedure 24(c) to prevent unnecessary and protracted delay in the appellate process.

After a trial by jury on March 28, 2001, the Appellant was found guilty on both counts. On May 10, 2001, with the consent of the Appellant, the trial court placed the Appellant on judicial diversion, pursuant to Tennessee Code Annotated § 40-35-313 (Supp. 2001), for six months. On April 26, 2001, the Appellant filed a motion for new trial, which was denied on August 16, 2001. This appeal followed.

ANALYSIS

Judicial diversion is a legislative largess whereby a defendant adjudicated guilty may, upon successful completion of a diversion program, receive an expungement from all official records any recordation relating to “arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to the diversion statute.” *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999) (citing Tenn. Code Ann. § 40-35-313(b) (1997)). “The effect of discharge and dismissal under the diversion statute ‘is to restore the person . . . to the status the person occupied before such arrest or indictment or information.’” *Id.* (quoting Tenn. Code Ann. § 40-35-313(b)). A final disposition of the case does not occur until either the defendant successfully completes the diversion program or violates a condition of his release. *State v. Teresa Dockery*, No. E2001-01493-CCA-R3-CD (Tenn. Crim. App. at Knoxville, May 23, 2002); *State v. Glenna Kidd*, No. 01C01-9808-CR-00344 (Tenn. Crim. App. at Nashville, May 13, 1999).

Rule 3 of the Tennessee Rules of Appellate Procedure establishes that an appeal as a matter of right lies “from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty. . . .” Tenn. R. App. P. 3(b); *see also* Tenn. R. Crim. P. 37(b)(1). In addition, Rule 3(b) provides that a “defendant may also appeal as of right from an order denying or revoking probation, and from a judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.” Tenn. R. App. P. 3(b). An adjudication of guilt followed by an order of judicial diversion does not result in a judgment of conviction unless the defendant violates the conditions imposed by the trial court. *Teresa Dockery*, No. E2001-01493-CCA-R3-CD; *Glenna Kidd*, No. 01C01-9808-CR-00344. “Although the choice to accept judicial diversion at least postpones and perhaps jeopardizes the defendant’s opportunity to raise a legal issue, the *quid pro quo*, as compared to the defendant who pleads guilty and receives a conviction and a probated sentence, is that the defendant who accepted diversion has a self-determined chance to emerge from the process without a conviction on his or her record.” *State v. Norris*, 47 S.W.3d 457, 463 (Tenn. Crim. App. 2000). Therefore, we conclude that because there is no judgment of conviction, the Appellant has no basis for an appeal as of right under Tennessee Rule of Appellate Procedure 3(b).

An appeal filed improperly under Rule 3 may, however, be treated as an application for extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. *Norris*, 47 S.W.3d at 463; *State v. Leath*, 977 S.W.2d 132, 135 (Tenn. Crim. App. 1998); *Teresa Dockery*, No. E2001-01493-CCA-R3-CD. Rule 10 provides that an extraordinary appeal may be sought “if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review.” Tenn. R. App. P. 10(a). An extraordinary appeal should only be granted

when it is established that: (a) the ruling of the court below represents a fundamental illegality; (b) the ruling constitutes a failure to proceed according to the essential requirements of the law; (c) the ruling is tantamount to the denial of either party of a day in court; (d) the action of the trial judge was without legal authority; (e) the action of the trial judge constituted a plain and palpable abuse of discretion; or (f) either party has lost a right or interest that may never be recaptured. *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980).

Under these criteria, the trial court possessed jurisdiction and had the authority to place the Appellant on judicial diversion. We find that the Appellant has failed to meet the requirements for the granting of a Rule 10 extraordinary appeal. Accordingly, this court lacks jurisdiction to review the Appellant's appeal, and the appeal is dismissed.

CONCLUSION

Under the judicial diversion statute, there is no "judgment of conviction" to appeal pursuant to Rule 3, Tennessee Rules of Appellate Procedure, unless the Appellant violates a condition of probation, resulting in termination of the diversion program and an adjudication of guilt. Because the Appellant was placed on judicial diversion and no adjudication of guilt was entered, the appeal is dismissed.

DAVID G. HAYES, JUDGE